OPINION OF HON. JOHN NELSON ON NOMINATION OF DR. J.SIMONS, AS A SURGEON IN THE ARMY OF THE UNITED STATES

OPINION OF HON. JOHN NELSON.

BALTIMORE, 25*th January*, 1859.

DEAR SIR,—In availing myself of the privilege accorded by your note of 21st inst. I propose to confine myself to an examination, necessarily brief and hurried, of the legal principles that are supposed to be involved in the pending nomination of Dr. J. Simons, as a Surgeon in the Army of the United States. Of the merits of his case as presented by the proceedings which eventuated in his dismissal from the public service, I shall say nothing, assuming that the investigation, laborious and thorough, already prosecuted in the Senate, and which resulted in his signal vindication, must on that point be regarded as conclusive.

The single inquiry I suppose now to be whether, under all the circumstances, the nomination of Dr. Simons as made to the Senate is consonant to the Constitution and the Laws of the United States. With a view to the satisfactory solution of this question, it is proper to recapitulate facts and dates.

Dr. Simons was originally appointed Assistant Surgeon with rank as such, from the 11th day of July, 1839. He continued to serve in that capacity until the 12th day of November, 1855, when he was tried by a General Court Martial, convened at Fort Riley, by which he was adjudged to be dismissed from the service.

This sentence was approved by President Pierce, on the 16th day of January, 1856, and he was accordingly dismissed. On the 24th day of October, 1856, he was re-appointed Assistant Surgeon. And at the ensuing session of Congress begun on the first Monday of December, 1856, his nomination was submitted to the Senate for confirmation.

At the same time the nominations of Thomas C. Madison, and Jos. K. Barnes, who had been the juniors and next in rank to Dr. Simons, before his dismissal, were communicated to the Senate, and together with that of Dr. Simons referred to the Commitee on Military Affairs. These nominations were reported to the Senate, and after full discussion, confirmed on the 3rd day of March, 1857, accompanied by the following resolution, which was likewise adopted.—"*Resolved*, That the Senate advise and consent to the appointment of James Simons to be Assistant Surgeon in the Army, and recommend that the President direct that he take rank from the 11th day of July, 1839, and next after Surgeon De Leon." In pursuance of this resolution, Dr. Simons was commissioned by the President, with the rank recommended, on the 28th May, 1857. Commissions were about the same time issued to Surgeons Madison and Barnes, *with a notice to them*, under the date of the 2nd day of June, 1857, of the Senate's resolution in the case of Dr. Simons, and apprising them that "this officer, (Dr. Simons,) would (will) be nominated to fill the first vacancy of surgeon, which might (may) occur, and to take place as such next below Surgeon David C. De Leon."

A vacancy having occurred by the death of Surgeon Harney, Dr. Simons was accordingly appointed by the President a Surgeon in the Army, on the 20th day of September, 1858, with rank from the 29th day of August, 1856. For this appointment he has now been nominated to the Senate for confirmation.

On the 6th day of November, 1843, whilst Attorney General, I gave an opinion in the case of Mr. Morehead, in which will be found the following passage.

"The judgment of the tribunal created by the law has been pronounced and carried into effect, and the officer upon whom it operated was thenceforth unquestionably out of the service. The judgment I now hold to be irreversable. If Mr. Morehead is restored to the service it must be through the power of appointment." The opinion then expressed I still entertain, not only as it affects the case of an officer dis-

missed in pursuance of a judgment of a Court Martial, but the case of every officer dismissed by competent authority, however and for whatever cause so dismissed. Once out of the service, I am aware of no authority by which he can be restored, except by that of the President in the exercise of his power of appointment and nomination.

The opinion given by me in the case of Morehead, will be found to be fully sustained by that of Mr. Legare in the case of Surgeon Du Barry of the 29th November, 1842, in which he says:

"He was clearly out of the service by a lawful and valid, however harsh (and even it may be unfair) exercise of the executive power. If he has been restored, it has not been by avoiding the act dismissing him, for *that could not be done. It was beyond the power of the executive.* All that the President can do in such case is to repair any wrong done by a new appointment."

Dr. Simons' case is one in which that power has been so exercised. He was appointed by the President on the 2d day of October, 1856, and his appointment was sent to the Senate for confirmation. In this there was surely nothing irregular or at all inconsistent with the opinion expressed by me in Mr. Morehead's case. On the contrary, it was in exact conformity with its principles, and I presume, if the Senate acting nakedly on the nomination made to it, had confirmed Dr. Simons as an Assistant Surgeon, and he had been commissioned in the terms of the provisional appointment, no question could have been raised touching the legality of the proceedings.

The irregularity, if any exists, is to be found in the fact that the Senate departed from the terms of the nomination, and qualified it by the recommendation embraced in their resolution. If there be nothing in this to invalidate the action that has been had the case is clear of all difficulty, inasmuch as the President, in issuing the commission has only followed out the wishes and recommendation of the Senate.

Now I hold it to be perfectly clear, upon principle, as it is in accordance with the long settled and established practice of

the Government, that the President may restore an officer dismissed from the public service by a new appointment, and that in nominating him for such restoration he may reinstate him in the rank he would have attained had he not been removed. In the case of Surgeon Du Barry, before quoted, Mr. Legare says, "He (the President) may restore, and he may (unless prohibited by some special law) nominate the injured officer to a rank equivalent to that he would have reached had no injustice been done him in the usual course of promotion. *This is within his constitutional authority*, but in my opinion he has no power to do more. Rank he can give from and after his appointment, for this is the effect, whatever may be the form of such a commission.

The correctness of this opinion is fortified by the sanction of near forty years practice, as may be seen by reference to a report made by Adjutant General Cooper, to Senator Iverson, then a member of the Committee on Military Affairs, under date of the 26th of January, 1858, in which will be found enumerated nineteen distinct cases, including that of Dr. Simons, in which the principle has been recognized and acted on, and since the date of that report, during the session of 1858, the cases of Capt. Alex. W. Reynolds, dismissed October 9th, 1855, and First Lieut. Matthew R. Stevenson, dismissed on the 22d of Sept. 1856, strikingly analogous in principle with that of Dr. Simons, have been submitted to the judgment of the Senate, and their nomination with the dates of their rank relating back sanctioned and confirmed. To those cases, as well as to the cases of Captains Deas and Dobbins, and Lieut. Northrop, I beg leave, in this connection, to invite your particular attention.

The practice in regard to appointments in the Navy has been the same. I remember now only the cases of Lieut. Chandler and Lieut. Meade.

But it may be said, and I suppose this to be the ground of difficulty in your mind, (for from the nature of the case and the duty devolved on you being of an executive character, I cannot ascertain otherwise than by conjecture, what your views are,) that whilst it may be true that the President is

clothed by the Constitution with power to nominate, and in such nomination to fix the rank of an officer, yet that in this case he has not done this, and that the rank has been fixed by the act of the Senate, and that if yielding to the Senate's recommendation, the President chose to appoint Dr. Simons with the rank recommended, the appointment as made on the 8th day of May, 1857, should have been submitted to the Senate for confirmation, and not having been so submitted, it can have no legal validity.

This objection has a seeming support in the opinion of Attorney General Butler, of the 29th of March, 1837, in the case of Lieut. Coxe, in which he maintains that the fixing of the rank of the nominee by the Senate was illegal, and that no commission could properly issue; and you will find upon referring to my opinion of the 9th of August, 1843, that I held that the commission in that case, *not having been in fact issued*, Lieut. Coxe by force of the mere nomination and confirmation was not restored to the service.

Undoubtedly the action of the Senate was not conclusive upon the President, who had the power to commission or not, as in every other case; and if he did not concur in the action of the Senate, he had a perfect right to refuse to consummate the appointment.

But in the case of Dr. Simons the President *has concurred with the Senate*, and has issued a commission, and *thereby consummated* the appointment.

The power of the President is to *nominate*, and by and with the *advice* of the Senate to *appoint*. Certainly the Senate has no power to originate a nomination; that is the peculiar function of the President. But in regard to nominations made, the Senate has the authority not only to confirm, but to advise the President, and there is no reason, as the object of consulting the Senate is to obtain its sanction to the President's action, why, in the case of concurring views, the advice may not be addressed to the rank of the officer nominated, in the first instance as afterwards. If unacceptable to the President, he may disregard it, and refuse to act upon it, as Gen. Jackson did, in the case of

Lieut. Coxe, or if acceptable, he may conform the appointment to the recommendation, as was done in the case of Cols. House and Fenwick, and Major Eustis. Whenever the commission issues it consummates the appointment, embracing, as it does, the concurrent judgment of the Senate and President.

In a case like the present, it would seem, at best, to be an unmeaning form to return a nomination to the Senate for confirmation, upon which it had but just passed its approbatory judgment. I submit that under the Constitution, the Senate, in regard to nominations, is an advisory body, and there is nothing incompatible with the nature of its functions in its suggesting to the President its views as to the rank of an officer, leaving it to the Executive authority to decide upon the propriety of such suggestions, and I think the principle is clearly involved in the cases of Cols. House and Fenwick and Major Eustis, before referred to. But there is a case of more recent date, to which I pray leave to invite your attention, and which enforces, I think, the views I desire to present. It is the case of Major Crittenden, of the Mounted Riflemen, who was cashiered by the sentence of a General Court Martial, on the 19th of August, 1848, and who was restored on the 15th of March, 1849, to his former position and rank in the Army, without (as I understand) a nomination to the Senate. This was done because the Senate, upon an examination of the proceedings, on the 2d March, 1849, had *pronounced his trial and conviction to be irregular and contrary to law.*

Now it is clear that the Senate has no authority to review and correct the proceedings of a Court Martial. That power is confided to the President alone, and when he has once exercised it, it ceases to exist any where. In the emphatic language of Mr. Legare, in Lieut. Coxe's case, "if the sentence of dismissal be harsh and even unfair, he was out of the service," by virtue of the act of dismissal. But the Senate, in the exercise of an undoubted right in considering whether a vacancy, created by the dismissal of Major Crittenden, should be filled, expressed its opinion, which was its advice to the President.

I do not doubt that Major Crittenden was properly restored to the service, but he was thus restored by an appointment made by the President, without the form of a nomination to the Senate, for the sufficient reason that it had already advised such action on his part, and it would have been a useless ceremony to submit the nomination anew, for confirmation.

The omission to nominate was mere form, and involved no consideration of substance.

I have not the means of reference to verify it, but my impression is, that the Senate, in its advisory capacity, in the ratification of Treaties, has often concurred, with conditions and amendments, and that such Treaties, when so provisionally ratified, after amendments made or conditions complied with, have never been required to be submitted anew to the Senate. I beg you to direct your attention to this suggestion, and to consider, *if it be true*, how strongly it illustrates the view I take of the power of the Senate, in the analogous case of nomination to office.

It has been intimated to me that an objection has been suggested to the confirmation of Dr. Simons' nomination, upon the ground that the act of 1851, ch. 33, has declared "that all promotions in the Staff Department or Corps, shall be made as in other Corps of the Army;" whilst the act of 1853 provides "that no officer shall be promoted before those who rank him in his Corps," and that the Army regulations have been conformed to these enactments.

If the views I have presented be well founded Dr. Simons rightfully stood at the head of the List of Assistant Surgeons, by virtue of his Commission of the 28th day of May, 1857, and so standing is entitled to promotion to fill the existing vacancy, and his nomination is in strict conformity with the provisions of the Acts of Congress, as well as the regulations. I do not suppose, other objections being obviated, that this can be seriously entertained.

In looking at this case, with the imperfect means of investigation at my command, and uninformed as I am of the par-

ticular objections to the confirmation of the nomination of Dr. Simons, I cannot perceive how it can be reasonably withheld; and especially when I call to mind that he has been induced to remain in the service, upon the faith of the deliberate action of the Senate affirming his rights, and reposing upon the Commission he holds under the hand and authority of the President, issued in furtherance of the Senate's recommendation, and supported by the official opinion of the distinguished Attorney General of the United States.

I have the honor to be, &c., with the highest respect, dear sir, your obedient servant,

[Signed,] JOHN NELSON.

HON. JEFFERSON DAVIS, &c., &c.

STATEMENT OF THE CASE.

By an order of President Pierce, of the 16th January, 1856, Dr. James Simons, then an Assistant Surgeon in the United States Army, with rank from the 11th of July, 1839, upon the sentence of a Court Martial, was dismissed from the Army.

In the same year, (1856,) after an examination by a Medical Board of the Army, he was again appointed an Assistant Surgeon in the Army, and nominated and confirmed as such.

The President, (Pierce,) nominated him simply for an Assistant Surgeon. But the Senate having by its Committee reviewed his trial, in confirming him as Assistant Surgeon, passed a resulution "that the Senate advise and consent to the appointment of James Simons to be an Assistant Surgeon in the Army, and recommend that the President direct that he take rank from the 11th July, 1839, and next after Surgeon De Leon." (Passed 3d March, 1857.)

This resolution was transmitted to the incoming President Buchanan. The Secretary of War issued Dr. Simons' Commission, and sent it to him. On its face it states "to take rank, as Assistant Surgeon, from the 11th July, 1839;" and his name was placed at the head of the Assistant Surgeons on the Army Register, by virtue of the above rank.

In September last, a vacancy occurred by the death of Surgeon Harney, and Dr. Simons was appointed to fill it; and he has now been nominated for this appointment, with rank as Surgeon next to Doctor De Leon.

While Dr. Simons was out of the Army, two Assistant Surgeons, Madison and Barnes, were promoted. Before, however, their Commission as Surgeons were delivered, the War Department had received the Senate's resolution, which, if gratified, would place Dr. Simons above both these gentlemen, as he originally out-ranked them. But as Simons, at the time, was confirmed as an Assistant Surgeon only, he could not be placed next to Dr. De Leon, who was a full Surgeon. So the Secretary, in delivering to Barnes and Madison their Commissions, notified them that upon the first vacancy he would promote Dr. Simons as Surgeon to rank next after Dr. De Leon, and above them.

Now his nomination is for this place "as Surgeon next after Dr. De Leon." It is only in this way that the resolution of the Senate alluded to of March 3d, 1857, can be gratified, and a complete restoration of Dr. Simons' effected, as his original place on the Army Rolls was next to Dr. Leon. On these facts your opinion is requested on the following questions:

1st. Can the judgment of a Court Martial approved be reversed, and the President, in such a case, restore the officer to his former place and rank?

2d. Has the President the power to arrange the rank of an officer, relatively to others of the same grade, and had he the right, when requested by the Senate to do so, to place Dr. Simons in his old rank, as of the 11th July, 1839, and at the head of the Assistant Surgeons?

3d. Can the President rightfully nominate or appoint Dr. Simons as Surgeon next to Dr. De Leon and above Drs. Madison and Barnes, and can the present Senate lawfully consent thereto.

To the Hon. Reverdy Johnson,
January 26th, 1859.

OPINION OF MR. JOHNSON.

The several questions submitted to me on the above case, I have duly considered, and proceed to answer them as much in detail as the time allowed me will permit.

First.—The sentence of a Court Martial approved, if on its face the officer was within the jurisdiction of the Court, is binding, and the officer, if dismissed the service, can only be restored by re-appointment. But the rank he is to have by the new appointment may be fixed by the President, with the advice and consent of the Senate. This is within the discretion of the appointing power, and may be exercised, wholly irrespective of the proceedings of the Court.

Second.—The mode of appointing under the Constitution, requires the advice and consent of the Senate, but whether that advice and consent precedes the nomination or not, is immaterial; if it precedes the appointment, it is sufficient. The President may nominate of himself without consulting the Senate, but it is only by and with their advice and consent that he can appoint. The Constitution provides only for such advice and consent. The manner of giving it and the time of giving it is not directed, except that it must exist when the appointment is made. That rank may be given, when such is the joint judgment of the President and Senate, as of a date prior to the actual nomination and appointment, has, I think, never been seriously doubted. The Army Register exhibits many such cases, and the opinions of the Attorneys General hold it to be legal. This will be seen by the opinion of Mr. Butler, 29th March, 1837, in Coxe's case of Mr. Legare, in Du Barry's case, of the 29th

November, 1842, and of Mr. Nelson, in Whitney's case, of the 6th November, 1843. See 3d vol. Attorney General's opinions, p. 189, and 4th vol. pp. 123 and 274. In each of these cases the authority to fix the rank, as of a day antecedent to the appointment, is clearly stated. In the first case the authority is, in words, maintained. The case itself, and the question submitted to the Attorney General Legare, was one in which the officer claimed pay from the date of the rank, and not merely of the appointment. He held against the claim, but conceded the right to antedate as to rank. "The President," he said, "may restore, and he may, (unless prohibited by some special law,) nominate the injured officer to a rank equivalent to that which he would have reached (had no injustice been done him) *in the usual course of promotion.*"

The question before Mr. Attorney General Nelson was, whether an officer legally and wholly out of the service could be replaced in it at all, except by way of original appointment, and he held, and I have no doubt properly, that he could not.

But the authority of the President with the advice and consent of the Senate, to grant in such new appointment, rank from a preceding day was not only not denied, but virtually admitted.

I am therefore clear in the opinion, that rank may be so given.

THIRD.—The Constitution prescribing no other time for the Senate's advice and consent, than that it shall precede the appointment, I am equally clear that it was with the President when the advice was given, contained in the resolution of the Senate, of the 3d March, 1857, consenting to the appointment of Dr. Simons, on his nomination as Assistant Surgeon, that he shall "take rank from the 11th of July, 1839, and next after Surgeon De Leon," to appoint under such advice and to give the stipulated rank, as if he had by his nomination so provided. He was certainly not bound to act upon such advice, he might have withheld the appointment altogether, because the advice and consent went beyond the exigency of the nomination. But this was for himself to

decide. If he concurred in the recommendation, and appointed accordingly, there was in the appointment all that the Constitution required, the joint will of the President and Senate. But the question is not an open one. It has not, that I am aware, been presented in the instance of an appointment to an officer, but in the case of treaties it has often been presented and acted upon, and without doubt. The first part of the same clause of the Constitution, which relates to appointments, contains the treaty power. (Art. 2, § 2, clause 2d.) "He (the President) shall have power, *by and with the advice and consent* of the Senate, to make treaties," &c. In the earlier stages of the Government this advice was asked orally, and given in advance of negotiation; and in several instances, without, that I have ever heard, any suggestion of its illegality, that advice and consent has been given conditionally, after a treaty negotiated—clauses have been stricken out and qualifications to existing clauses inserted. This was done in the case of the Florida Treaty of February, 1819, also in the recent Gadsden Treaty. In no such case did the President, if he concurred with the Senate in the changes advised by them, when he had afterwards obtained the consent of the Foreign Government to such changes, think it necessary to submit the Treaty again as modified for their further advice and consent. This was considered as having been obtained by the first submission and his assent to the *advice* and consent given on such submission. The two cases are in principle identical. They arise on the same words, in the same clause of the Constitution, and must receive the same interpretation. If these Treaties therefore have been legally made, the appointment in question will be legally made, if the Senate now confirm the pending nomination of Dr. Simons. That the President had the right to appoint him under the advice of the 3d March, 1857, to take rank from the day advised, I have no doubt; and this being legal, his present nomination, the consequence of that rank, is necessarily within the President's power.

REVERDY JOHNSON.

Washington, 28th January, 1859.